**At the Supreme Court Sitting as the High Court of Justice**

**HCJ 703/15**
**HCJ 704/15**
**HCJ 978/15**
**HCJ 1664/15**

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| Before: | **Honorable President M. Naor**<br>**Honorable Deputy President E. Rubinstein**<br>**Honorable Justice H. Melcer** |
| The Petitioners in HCJ 703/15: | 1. **_____ Darwish**<br>2. **HaMoked - Center for the Defence of the Individual, founded by Dr. Lotte Salzberger** |
| The Petitioner in HCJ 704/15: | **_____ Darbas** |
| The Petitioner in HCJ 978/15 and in HCJ 1664/15: | **_____ al-'Awal** |
| | **v.** |
| The Respondent:<br>The Respondent in HCJ 1664/15: | **GOC Home Front Command**<br>**Military Commander of the West Bank** |
| Petitions for *Order Nisi* | |
| Session date: | Adar 25, 5775 (March 16, 2015) |
| Representing the Petitioners: | Adv. Andre Rosenthal |
| Representing the Respondents: | Adv. Aner Helman |

# Judgment

**Deputy President E. Rubinstein**:

1. Petitions against orders issued by the GOC Home Front Command on November 30, 2014, prohibiting petitioners' presence in the municipal area of Jerusalem, without a special permit,

until April 30, 2015; and also against an order prohibiting entry into the Judea and Samaria Area issued by the Military Commander of the West Bank on December 3, 2014, which is in force until June 1, 2015.

**HCJ 703/15 and HCJ 704/15 – Background and Previous Proceedings**

2. The petitioner in HCJ 704/15 (hereinafter: **Darbas**), is twenty three years old, and lives with his family in Al 'Isawiya neighborhood in East Jerusalem. In the past he was convicted in several cases, in a number of offenses: identification with an unlawful organization; participation in a riot; assault of a policeman; and an attempted assault of a policeman. The state argues that Darbas is an activist in the terror organization "The Popular Front for the Liberation of Palestine" (hereinafter: the **Popular Front**), and that his prohibited activity is carried out mainly in the area in which he resides. The petitioner in HCJ 703/15 (hereinafter: **Darwish**), is twenty four years old, and also resides in the Al 'Isawiya neighborhood. In the past he was convicted in several cases, in a number of offenses: membership of a terror organization; attempted assault and causing bodily injury by two or more, participation in a riot; providing an article to a terror organization; giving money to a terror organization, holding propaganda in favor of a terror organization and publication of statements in support of a terror organization. The state argues that Darwish is also an activist in the terror organization the Popular Front, and that his prohibited activity is carried out mainly in the area in which he resides. Said activity includes, according to the state, participation in and leading of terror attacks and disorderly conducts in the area in which he lives.

3. On November 30, 2014, the GOC Home Front Command issued orders which prohibit Darbas and Darwish from entering and staying in the municipal area of Jerusalem for five months. On December 9, 2014 objections were submitted in this matter to the GOC Home Front Command. On December 22, 2014, a hearing was held in their matter, where they were given the opportunity to make oral arguments. Darbas and Darwish were interrogated, each one separately, by the Israel Police, on January 18, 2015. Their objections were denied by the GOC Home Front Command on January 22, 2015. On January 29, 2015, the petitions at hand were filed.

**HCJ 978/15 and HCJ 1664/15 – Background and Previous Proceedings**

4. The petitioner in HCJ 978/15 and in HCJ 1664/15 (hereinafter: **al-'Awal**), is thirty one years old, and resides with his family in Ras al 'Amud in East Jerusalem. In the past he was sentenced to one year imprisonment for disorderly conduct and membership of an unauthorized association. The state argues that al-'Awal is a central activist in the terror organization the Popular Front, who took an active part in the violent incidents in Shu'fat after the murder of the youth Muhammad Abu Khdeir.

5. On November 30, 2014, the GOC Home Front Command issued orders which prohibit al-'Awal from entering and staying in the municipal area of Jerusalem for five months; On December 3, 2014, the Military Commander of the West Bank Area issued an order which prohibits al-'Awal from entering and staying in the Judea ands Samaria Area for about six months. On December 10, 2014, al-'Awal submitted an objection to the GOC Home Front Command, and on December 28, 2014 he submitted an objection to the military commander. On December 22, 2014, a hearing was held in his matter, in which he was given the opportunity to make oral arguments. al-'Awal was interrogated on February 2, 2015, and his objection was denied on February 5, 2015, by the GOC Home Front Command. On February 9, 2015, al-'Awal's petition for the revocation of the order which was issued by the GOC Home Front Command was filed with this court. On February 24,

2015, the objection submitted by him to the Military Commander of the West Bank Area was also denied, and on March 5, 2015, an additional petition was filed for the revocation of the order issued by the military commander.

**The Arguments of the Parties**

6. Petitioners' legal argument focuses on the validity of the Defence (Emergency) Regulations, 1945 (hereinafter: the **Defence Regulations**), by virtue of which the removal orders were issued in their matter. The petitioners argue that the orders were issued without authority in view of the fact that the Defence Regulations, so they argue, never entered into effect in the state of Israel. The petitioners argue that the Defence Regulations were revoked before the foundation of the state by The Palestine (Revocation) Order in Council, 1937 (hereinafter: the **Revocation Order**), which was enacted on May 12, 1948; Therefore, the Regulations could not be given effect by section 11 of the Law and Administration Ordinance, 5708-1948, which provides that the mandatory law will continue to be in force in the state of Israel. The petitioners acknowledge the fact that the Revocation Order was not published in the official gazette, the Palestine Gazette, and therefore, ostensibly, never had any effect, since it constitutes a hidden law as this term is defined in section 11A(b) of the Law and Administration Ordinance; However, according to the petitioners, the Revocation Order entered into effect and revoked the Defence Regulations, since the publication obligation did not apply thereto. To base their argument the petitioners refer to two sources. Firstly, a notice dated May 4, 1948, which was published in the official gazette; according to said notice, certain legislation will not be gazetted owing to the difficulty, under prevailing conditions, to publish the official gazette. Secondly, regulation 4 of the Defence Regulations which stipulates that the publication obligation does not apply to "emergency documents". According to the petitioners, the Revocation Order constitutes an emergency document for this matter. The petitioners argue further that the Defence Regulations are secondary legislation which were never enacted or extended by the Knesset.

7. In addition to their main argument, the petitioners raise a host of alternative arguments. Hence, it is argued that regulation 108 of the Defence Regulations fails to meet the conditions of the limitation clause established in Section 8 of the Basic Law: Human Dignity and Liberty, in view of the fact that it does not befit the values of the state of Israel – since orders may be issued there-under based on privileged information, without giving the petitioners an opportunity to properly defend themselves, subject to a general interrogation only which does not specify the concrete suspicions raised against them; and in view of the fact that the only evidence in the possession of the authorities was obtained in the framework of problematic relations between the informants and their agents. It is also argued that the prohibition to stay in the entire municipal area of Jerusalem and the duration of the prohibition are not proportionate. As argued in the petitions of Darbas and Darwish, their rights were violated by the mere fact that the hearing was held two months after the orders were issued, while they were prevented from entering the city throughout the entire period. With respect to the order issued by the Military Commander of the West Bank Area, al-'Awal argues that the order should be revoked in view of the fact that a separate hearing in that regard has not been held; He also argues that the prohibition to stay in the entire Judea and Samaria Area and the duration of the prohibition are not proportionate.

8. The respondents open their response with a review of the security situation in Jerusalem during the second half of 2014, and the manner by which the state copes with the security incidents. To the crux of the matter, the respondents argue that the Revocation Order never entered into effect

in view of the fact that it was not published as required and constitutes a hidden law in accordance with the provisions of section 11A(b) of the Law and Administration Ordinance. According to the respondents, it is clear that the exemption from publication which is stipulated in regulation 4 of the Defence Regulations does not apply to the revocation of the law by virtue of which the Regulations themselves were promulgated in the first place. The respondents argue further that the Defence Regulations are primary legislation. However, even if they are regarded as secondary legislation, they should not be revoked by virtue of the Basic Law: Human Dignity and Liberty, since they were enacted before the Basic Law and therefore constitute protected law pursuant to section 10 of the Basic Law.

9. With respect to petitioners' ability to defend themselves against the order, the respondents argue that the petitioners were given an open paraphrase which specifies the underlying reasons based on which the orders were issued. In addition, the petitioners were interrogated and in the framework of said interrogation they were presented with the suspicions which were raised against them. The respondents acknowledge the fact that the petitioners were not interrogated in connection with specific actions, but they argue that such an interrogation would have put at risk the sources of the information. With respect to the quality of the evidence underlying the orders, the respondents argue that the information is reliable and cross-referenced. With respect to the proportionality issue, the respondents argue that the duration of the order and its geographic scope are proportionate, considering the security need and petitioners' circumstances. With respect to the fact that the hearing was held in retrospect, the respondents argue that it was imperative to conduct the hearing in that manner in view of the security situation in Jerusalem and the concern that they may escape from the authorities. The respondents acknowledge the fact that the rule under administrative law requires that a hearing be held, but they argue that whenever a hearing in advance may frustrate the objective of the procedure, a hearing in retrospect may suffice.

10. In a hearing dated March 16, 2015, the parties reiterated their main arguments before us. The petitioners emphasized, *inter alia*, the difficulty involved in the delay which occurred between the date on which the order was issued and the date on which the hearing in their matter was held. The respondents wished to clarify that petitioners' hearing was not their interrogation by the police, but rather the objection which was submitted by them and was heard by a representative on behalf of the GOC Home Front Command.

**Decision**

11. We shall concisely refer to the argument concerning the Defence (Emergency) Regulations, 1945. Said argument is always appealing in view of the fact that these Regulations do not constitute a source of pride for the state of Israel; they were created by the mandatory regime and were used by it as a tool against the struggle of the Jewish settlement for independence. Seventy years passed since these Regulations entered into effect, and their replacement by Israeli legislation has long been due, and it is indeed appropriate: the scope of judicial review exercised over such legislation will be broader than over said Regulations, which constitute protected law pursuant to section 10 of the Basic Law: Human Dignity and Liberty. And indeed, a bill for the amendment of the Defence Regulations (Emergency)(Revocation of Regulations), 5773-2013 (*Governmental Bills* 5773, 992) was submitted to the Knesset, which proposed, *inter alia*, to abolish regulations 108-109 – and it should be remembered that in this case arguments against regulation 108 are raised - subject to the enactment of the Fight against Terrorism Law (proposed bill for the Fight against Terror, 5771-2011, *Governmental Bills* 5771, 1408). However, unfortunately, said bills have not yet matured into law. Therefore, the Defence Regulations are still part of the law of the state of Israel, with the exception of certain regulations which were abolished throughout the

years. In HCJ 3091/99 **Association for Civil Rights in Israel v. The Knesset** (2012), which concerned the renewal of the declaration of Israel's state of emergency, it was stated in my opinion as follows:

> "In this context a proposed bill for the amendment of the Defence (Emergency) Regulations, 1945 (hereinafter: the **Defence Regulations**) was recently published. As is known, the Defence Regulations were promulgated during the British Mandate in Palestine by the Mandatory regime as a measure to reinforce the powers of the High Commissioner (Article 6 of the King's Order in Council (Defence), 1937), and included many provisions on diverse issues including, *inter alia*, detention and expulsion, seizure and confiscation of assets by the government, judgment and punishment by civil and military courts, military censorship, imposition of taxes, etc. Said regulations were incorporated into Israeli law after the termination of the Mandate, through section 11 of the Law and Administrative Ordinance. The above Defence Regulations, despite their name, constitute primary legislation and their validity **is not conditioned** on the existence of the declaration concerning a state of emergency; however, the above act seems to point again at the state of mind and understanding of the authorities, that the time has come to revoke the remaining emergency legislation which accompanies us from the foundation of the state; some of which obviously seems anachronistic, not to say draconian, after the elapse of 64 years."

The above was also repeated time and time again in the past: see, *inter alia*, HCJ 8084/02 **Abassi v. GOC Home Front Command**, IsrSC 57(2) 55 (2003); HCJ 10647/03 **Sharbati v. GOC Home Front Command**, IsrSC 58(1) 810 (2003); HCJ 5211/04 **Vaanunu v. GOC Home Front Command**, IsrSC 58(6) 644 (2004).

Therefore the attempt to refute the validity of said Regulations will not succeed. Only recently, in HCJ 8097/14 **HaMoked: Center for the Defence of the Individual v. Minister of Defense** (December 31, 2014) it was stated in connection with regulation 119 of the Defence Regulations that the authority to exercise it existed, and that the discretion – the reasonableness – was the main issue (paragraph 20);see also Amichai Cohen and Stuart Cohen, **Shooting and Judging, Security and Law in Israel** (2014) 67-68. This is eventually the case in our matter, and the above said is also relevant to regulation 108.

12. The state's response concerning the Mandatory Revocation Order is acceptable to us; it is clearly a hidden law which therefore has no effect; even if certain things were not published in the Mandatory official gazette due to the security situation which existed towards the end of the British Mandate, the reasonable interpretation is that there was no intention to revoke a significant law in this manner, but rather various technical notices.

13. We take this opportunity to once again urge the new Knesset, which embarks on its way with our blessing, to pass the Fight Against Terrorism Law, *in lieu* of the Defence Regulations.

14. With respect to the specific cases, we have consensually reviewed ample privileged information. Indeed, the orders should be regarded against the backdrop of the unfortunate period and circumstances in Jerusalem and in the Area. We found that the paraphrases which were given by the respondents were correct, namely, with respect to Drabas - he is a Popular Front activist mainly in his village, including participation in and leading popular terror attacks and disorderly conduct; with respect to Darwish - he is a Popular Front activist whose actions are similar to

those of Darbas; and with respect to al-'Awal - he is a central Popular Front activist who is in contact with senior activists of the organization, who took part in violent incidents in Shu'fat after the horrendous murder of the youth Muhammad Abu Khdeir. The petitioners themselves are, naturally, well aware of the above.

15. Some arguments concerned – as aforesaid – the procedural aspect, the interrogation and the times of the hearing. Indeed, it is difficult to conduct a thorough interrogation while the vast majority of the relevant material is based on intelligence information which cannot be disclosed; therefore, the above is subject to judicial review – and this court hears each and every week administrative detention files which commenced in the military courts in two instances, and a panel of three Justices examines the privileged information. The same applies to the cases at hand. On the other hand, it has already been said more than once that an interrogation should be substantive (HCJ 1546/06 **Gazawi v. Military Commander of the West Bank** (2006)). The authorities must make an effort to conduct a serious interrogation to the maximum extent possible, and on such schedule which provides it with the proper fairness and proper visibility; the respondents should bear in mind, in the future, that an effort should be made to conduct a serious interrogation to the maximum extent possible, as well as a hearing in advance according to an expedited schedule, and if the hearing is held in retrospect, an un-condemned necessity – without delay; and obviously, to the extent an "ordinary" criminal file may be opened rather than substitutes, it is preferrable. Nevertheless, even if there were flaws in the above context, which the state does not deny but only tries to explain – their severity does not justify an intervention on our part, and naturally, lessons may always be learnt.

16. With respect to the proportionality issue, this case concerns a removal rather than a detention, for a short and not very long period. See recently HCJ 1656/15 **Etinger v. Military Commander of the West Bank Area** (March 16, 2015), where the removal was for a longer period, and obviously, each case according to its circumstances. And simply, as was stated more than once, there is no room to compare this sanction against more severe ones.

17. In conclusion: we do not accept the petitions.

Given today, Adar 28, 5775 (March 19, 2015).

President Deputy President Justice